(26,763)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 677.

ASH SHEEP COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 2855

United States
Circuit Court of Appeals
For the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Names and Addresses of Attorneys of Record.

BURTON K. WHEELER, Esq., United States Attorney, Butte, Montana,

Solicitor for Complainant and Appellee.

C. B. NOLAN, Esq., and WILLIAM SCALLON, Esq., Helena, Montana,

Solicitors for Defendant and Appellant.

In the District Court of the United States, in and for the District of Montana.

IN EQUITY—No. 11.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on the 11th day of August, 1913, complainant filed its bill of complaint herein, being in the words and figures following, to wit: [1]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant. [1*]

*Page-number appearing at foot of page of original certified Record.

Bill of Complaint.

To the Judge of the District Court of the United States, District of Montana:

The United States of America, by James W. Freeman, United States Attorney for the District of Montana, under authority and by the direction of the Attorney General, brings this bill of complaint against the Ash Sheep Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, and by reason thereof a citizen and resident of said State and District of Montana; and thereupon shows unto your Honor:

1. That the said defendant, the Ash Sheep Company, at all the times hereinafter mentioned, has been and now is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Billings, Montana, and as such corporation has been and now is engaged in the buying and selling of sheep and other livestock in the State and District of Montana, and carrying on and conducting all such business and operations as are necessarily incident to the buying and selling of sheep in the State and District of Montana.

2. That on or about the 12th day of August, 1868, this complainant and the Crow tribe of Indians entered into, concluded and then and there was promulgated a treaty by which the United States of America set aside for the use and benefit of the [2] said Crow tribe of Indians that certain reservation within the State and District of Montana, which has

since been and now is known as the Crow Indian Reservation.

3. That during all of the times hereinafter mentioned this complainant was and now is the owner and lawfully entitled to the possession of all those certain tracts of land situate, lying and being within the original boundaries of the Crow Indian Reservation and a part thereof, in the State and District of Montana, and described as follows: Section twenty-seven (27), township two (2) north, range thirty-six (36) east; section twelve (12), township one (1) north, range thirty-six (36) east; sections six (6) and seven (7), township four (4) north, range thirty-six (36) east of Montana principal meridian. That all of said lands are reserved lands and a part of the lands reserved and set aside by the said United States for the use and benefit of the said tribe of Crow Indians, in said State and District of Montana.

4. That the lands hereinabove described are a part of the vacant ceded Indian lands of the said Crow tribe of Indians and that the Indian title to the same has not been extinguished and that said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior of the United States concerning Indian lands that have been opened for settlement and entry, dated November 27, 1911, and the Act of Congress of the United States approved April 27th, 1904 (33 Statutes at Large, page 352), entitled "An Act to ratify and amend an agreement with the Indians of Crow Indian Reservation in Montana, and making appropriation to carry the same into effect.

5. That on or about the 14th day of July, 1913, the exact date thereof being now unknown to complainant and for that reason [3] not more definitely alleged, and ever since said date, this defendant, the Ash Sheep Company, in violation of the rules and regulations of the Secretary of the Interior of the United States and said Act of Congress aforesaid, grazed and caused to be grazed upon the tracts of land hereinabove described, and other vacant ceded Indian lands reserved for the use and benefit of said Indians, and subject to the rules and regulations and Act of Congress hereinabove referred to, a more particular description of said lands is now to complainant unknown, a large number of sheep, to wit, about seven thousand one hundred (7,100) head; that the said sheep are being grazed, and are now trespassing in and upon the respective tracts of land hereinabove described; that the defendant company, acting by and through its agents, servants and employees, has not obtained authority or any permit whatsoever to graze and cause to be grazed said sheep in and upon the land hereinabove specifically described, as provided by the rules and regulations of the Department of the Interior of the United States, or any other officials of the complainant thereunto duly authorized.

6. And complainant further avers that grazing permits have been duly and regularly issued by its duly authorized agents to certain persons authorizing and permitting said persons to graze their stock, to wit, horses and cattle, upon all of the lands hereinabove described; that said persons to whom permits

have been issued have complied with all the rules and regulations made and promulgated by the Secretary of the Interior in that regard and have paid all fees required thereunder.

7. Complainant further avers that the said defendant, the Ash Sheep Company, acting through its officers, agents, servants and employees, are now grazing and will continue to graze said seven thousand one hundred head of sheep in and upon the lands hereinabove referred to unless restrained by this court; that [4] such action on the part of the said defendant company and its agents, servants and employees constitutes a continuing trespass and will materially injure and destroy the use and value of said lands and cause irreparable damage to this complainant, and deprive the Crow Indians of the benefits thereof; and that unless restrained by this Honorable Court the defendant, in defiance of the express mandate of the law so enacted by the Congress of the United States, will continue to graze said seven thousand one hundred head of sheep without due and lawful authority therefor first had and obtained, and said defendant now claims to have the right to so maintain said sheep in and upon said lands so held by the United States of America for the use and benefit of the Crow Indian nation, and will thereby prevent and prohibit the United States from asserting any right whatsoever in said lands.

8. That the said defendant, the Ash Sheep Company, in all of its operations hereinbefore described, has been and will act through divers of its officers, agents and employees; that the names of said officers,

agents, servants and employees are to this complainant unknown and for that reason they are not made parties to this cause in their own individual names. Complainant avers, however, that unless such officers, agents, servants and employees of the said defendant are likewise restrained by an order of this Court, they will continue to trespass upon said lands, as aforesaid, and this complainant will, when the names of said officers, agents, servants and employees shall be ascertained, ask this Honorable Court permission to enjoin said officers, agents, servants and employees as party defendants in this cause. That in consequence of the said acts of defendant company, complainant and the said Crow Indians herein have been and are being deprived of the benefit of said lands and premises, and complainant alleges that by reason thereof **[5]** the said Crow Indians and this complainant as hereinbefore set forth have sustained damages in the sum of seven thousand one hundred dollars ($7,100).

All of which actions, doings and pretenses of the said defendant and its said officers, agents, servants and employees are contrary to equity and good conscience and tend to the manifest injury and oppression of complainant in the premises.

WHEREFORE, forasmuch as complainant is remediless in the premises according to the strict rule of common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable;

To the end, therefore, that said defendant, the Ash Sheep Company, may full, true, direct and perfect

answer make to all and singular the matters and things hereinbefore stated and charged, but not on oath (its answer on oath being hereby expressly waived), as fully and particularly as if the same were here repeated and it thereunto distinctly interrogated; that the said defendant, the Ash Sheep Company and its officers, agents, servants and employees, during the progress of this cause and thereafter finally and perpetually may be enjoined from so grazing said seven thousand one hundred head of sheep on and upon said lands so described, and from occupying, using and trespassing on and upon said lands without having first obtained due and proper permission or authority from the Secretary of the Interior of the United States of America, and that the said defendant, its officers, and agents, be enjoined from employing or contracting with any individual, individuals, corporation or corporations not connected with or in the employ of said defendant from continuing the trespass hereinabove complained of, and from entering upon or going on the said lands, and that the said complainant may have and recover from said defendant the sum of seven thousand one hundred dollars ($7,100) damages; and [6] that the said complainant may have such other and further relief in the premises as may be considered just in this Honorable Court and agreeable to equity and good conscience.

May it please your Honor to grant unto this complainant a writ of subpoena of the United States of America, issued by and under the seal of this Honorable Court directed to the said defendant, the Ash

Sheep Company, thereby commanding it at a certain time and under a certain penalty therein to be limited to appear before this Honorable Court and then and there full, true and direct answer make to all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made against it in the premises, as shall seem fit and meet and agreeable to equity.

JAMES W. FREEMAN,
United States Attorney,
District of Montana. [7]

United States of America,
District of Montana,—ss.

James W. Freeman, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting United States Attorney for the district of Montana; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and things therein contained are true to the best of his knowledge, information and belief.

JAMES W. FREEMAN.

Subscribed and sworn to before me this 11th day of August, A. D. 1913.

[Seal] GEO. W. SPROULE,
Clerk.

[Indorsed]: Title of Court and Cause. Bill of Complaint. Filed Aug. 11, 1913. Geo. W. Sproule, Clerk. [8]

Thereafter, on August 11, 1913, a subpoena in equity was duly issued herein, being in the words and figures following, to wit: [9]

Subpoena.

UNITED STATES OF AMERICA,

District Court of the United States, District of Montana.

IN EQUITY.

The President of the United States of America, Greeting: To Ash Sheep Company, a Corporation, Defendant.

You are hereby commanded, that you be and appear in said District Court of the United States aforesaid, at the courtroom in Federal Building, Helena, Montana, on the 1st day of September, 1913, to answer a Bill of Complaint exhibited against you in said court by The United States of America, Complainant, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

WITNESS, the Honorable GEO. M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, this 11th day of August, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the 138.

[Seal] GEO. W. SPROULE,
Clerk.

By ————————,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT U. S.

You are hereby required, to file your answer or other defense in the clerk's office of said court on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso.*

[Seal] GEO. W. SPROULE,
Clerk.

By ——————————,
Deputy Clerk.

JAS. W. FREEMAN,
U. S. Atty.,
Solicitor for Complainant,
Helena, Montana. [10]

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within writ on the 11th day of August, 1913, and personally served the same on the 12th day of August, 1913, by delivering to, and leaving with Ash Sheep Company, a corporation, by Christ Yegen, President of said corporation, said defendant named therein personally at Billings, in the County of Yellowstone, in said district, a copy thereof with him, together with a true copy of affidavit of J. W. Freeman, U. S. Attorney, motion for preliminary injunction, motion for restraining order and bill of complaint in said cause.

Helena, August 12th, 1913.

WILLIAM LINDSAY,
U. S. Marshal.
By Charles Morgan,
Deputy.

[Endorsed]: No. 11. U. S. District Court, District of Montana. In Equity. United States vs. Ash Sheep Co. Subpoena. Filed Aug. 20th, 1913. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [11]

Thereafter, on Aug. 25, 1913, Answer was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY,

Defendant.

Answer.

Now comes the defendant and for answer to complainant's bill of complaint:

I.

Admits the allegations of paragraphs one and two.

II.

Admits the allegations of paragraph three, except that it denies that the lands referred to in said paragraph are reserve lands, and denies that the said lands are set aside by the United States for the use and benefit of the Crow Indians. In that connection, it alleges that the lands in question were ceded to the United States by the said tribe, and that said lands are a portion of the public domain of the United States; the said tribe having no claim there-

to, except that the proceeds from the disposition of said lands, to the extent provided for in the treaty and act of Congress providing for their cession shall be turned over to said tribe.

III.

Answering the allegations of paragraph four, admits that the lands referred to in said paragraph were part of the said Indian [12] lands, but denies that the Indian title has not been extinguished, and denies that the said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior, in so far as the rules and regulations referred to provide that permits to said lands shall be granted for rentals provided, and the rentals so provided turned over to the Crow Indians. In that connection defendant alleges that said lands are public lands of the United States and that the Indian title to same has been extinguished.

IV.

Answering the allegations of paragraph five, admits that sheep belonging to defendant, to the number specified in the bill of complaint, graze on the tracts of land described, but denies that the lands upon which they graze were reserved for the use and benefit of the Indians, and denies that the use of said lands is subject to the rules and regulations of the Indian Department, and denies that so grazing any trespass was committed.

Admits, however, that no permit to graze said sheep on said land, pursuant to the rules and regulations of the Interior Department was obtained. In that connection, however, defendant alleges that the

lands in question were public lands of the United States, and that pursuant to the policy of the Government of the United States, as to the free use of public lands for grazing and pasturage purposes, defendant a citizen of the United States, owning the sheep in question, asserted its right under that privilege and policy, and grazed its sheep on said lands.

V.

Answering the allegations of paragraph six, defendant has no knowledge or information sufficient to form a belief. [13]

VI.

Answering the allegations of paragraph seven, admits that it is grazing its sheep, and will continue so to do on said land, unless restrained from doing so.

Denies that its doing so is a trespass, and denies that the grazing of said sheep will materially or at all destroy the value of said lands.

Denies that its grazing said sheep in the manner herein set forth is in violation of the law, and admits that it claims to have the right to graze said sheep upon the said lands.

Denies that its grazing its sheep on said lands is in violation of any right of ownership in the United States of America, and, in that connection, avers that its grazing its sheep on said lands is in accordance with the express wish and policy of the Government of the United States, as to the use of public lands, including the land in question.

VII.

Answering the allegations of paragraph eight, admits that it will continue to use said land for graz-

ing purposes, unless restrained from so doing, and admits that its officers and agents, in the handling of said sheep will likewise do so, unless restrained.

Denies that in consequence of the acts of defendant, complainant or the Crow Indians have been deprived of the benefit of said lands, and denies that by reason of the acts charged, or of any other acts, the Crow Indians and the complainant, or either of them, have or will sustain damage in the sum of seven thousand one hundred dollars, or any other sum or amount.

Denies that the acts charged in the complaint are contrary to equity and good conscience, or either, or tend to the manifest injury of the complainant. [14]

Further replying to said paragraph, denies that complainant is without remedy at law, and denies that relief is obtainable only in equity.

Further answering said bill of complaint, defendant alleges that in the bill of complaint there are set forth two causes of action which cannot be joined, to wit, a cause of action in equity asking for injunctive relief on account of trespasses alleged to have been committed, and a cause of action for the enforcement of a penalty, pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and that by reason thereof in the bill of complaint in question there is a misjoinder of causes of action.

Further answering said complaint and that portion of same where damages are sought for the sum of seven thousand one hundred dollars, defendant avers that the claim for damages in question is made

pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and as such, is a claim based on the enforcement of a penalty, and as such, is a claim that cannot be enforced in equity.

WHEREFORE, having answered complainant's bill of complaint, defendant prays that complainant's bill be dismissed, and that it be awarded its costs in this behalf expended.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant.

Due personal service of within Answer made and admitted and copy received this 25th day of August, 1913.

J. W. FREEMAN,
Solicitor for Complainant.

[Indorsed]: Title of Court and Cause. Answer. Filed Aug. 25, 1913. Geo. W. Sproule, Clerk. [15]

That on the 19th day of August, 1913, the Memorandum Decision of the Court was duly filed herein, being in the words and figures following, to wit: [16]

United States District Court, Montana.

UNITED STATES,

vs.

ASH SHEEP CO.

Opinion.

Herein, the order to show cause is vacated (and

thereby the temporary restraining order is discharged.

Aug. 19, 1913.

BOURQUIN, J.

MEMO.

The Court will later extend its reasons. Briefly, they are that the Departments have no authority in the matter of public lands save to the extent conferred by Congress; that the Indian title to the lands involved, which was one of only occupancy and use, has been extinguished, the trust declared by the statute being but to the proceeds of sale of said lands; that Congress incorporated the lands in the general mass of public lands, directing they be opened to settlement and sale; that this confers no authority to lease or grant exclusive grazing privileges; that to lease or grant such exclusive privileges is counter to the implied license to general grazing, the policy of the Government for more than 100 years; that to set aside this policy and establish a new policy of exclusive lease or permit will not be implied where not necessary, and to accomplish it requires congressional sanction; that until said lands are settled upon or sold, they are open to general grazing, and exclusive permits to graze said lands are without authority and legal sanction, and are void. [17]

United States District Court, District of Montana.

UNITED STATES,

vs.

ASH SHEEP COMPANY.

By agreement, ratified by Congress, the Crow In-

dians ceded a part of their reservation in Montana to the United States. The granting clause is that "The said Indians . . . . do hereby cede, grant and relinquish to the United States all right, title and interest which they may have to the lands" therein described. The agreement provided for a definite and unconditional money consideration. This latter was modified in the ratifying Act, to the effect that in consideration of the cession, the United States agreed to dispose of said lands at not less than $4.00 per acre and pay the proceeds to said Indians. The Act further provided that all said lands were subject to withdrawal and disposition under the Reclamation Act so far as feasible, and those not so withdrawn "shall be disposed of under the homestead, townsite and mineral-land laws . . . . and shall be opened to settlement and entry by proclamation of the President"; that when in the judgment of the President no more of said lands "can be disposed of at said price . . . . he may . . . . sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interests concerned"; that the United States was not bound to purchase any of said land or to dispose thereof except as in the Act provided, or to guarantee to find purchasers, "it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the

proceeds received from the sale thereof only as received."

Act April 27, 1904.

Said lands were opened to the general settlement and entry by the President's proclamation of May 24, 1906. Much thereof has been disposed of, some by sale by virtue of the aforesaid power given [18] the President, and upon the remaining land and for the benefit of the Indians aforesaid the Bureau of Indian Affairs with the sanction of the Secretary of the Interior assumes to grant exclusive grazing privileges for a price.

Regulations have been prescribed by them providing that with the written consent of the superintendent of the reservation the licensee may fence and otherwise improve the lands; that the license may be revoked in the discretion of the Secretary of the Interior and is revoked *pro tanto* by any *bona fide* settlement upon sale or entry of any said lands, with proportionate refund of the consideration paid by the licensee; that upon expiration of the license all improvements placed upon the lands shall remain thereon and become the property of the equitable owner of the land; and that said superintendent must prevent trespasses upon said lands and prosecute trespassers.

This is a suit to enjoin defendant from trespassing and grazing upon said lands without a permit and upon which permits have issued to others.

An order to show cause issued and a temporary restraining order accompanied it. It now appears

that on May 14, 1913, a permit as aforesaid issued to a cattle company to graze a maximum number of cattle upon all such unsold and unentered lands in about eighteen townships and estimated to be 204,000 acres, for one year and renewable for four years, the consideration being $15,300 yearly, the Secretary of the Interior reserving the right to issue to residents on or adjacent to said lands permits to also graze a limited number of cattle thereon during the same time and at the same rate, "provided that such permittees pay a proportionate share of the actual cost of water development and provided that permittees of this permit have not their full amount of cattle on the range, the consideration of any such permits to be deducted from the consideration mentioned in this permit."

The contention for complainant is that the lands involved are yet so far Indian lands, that the Indians are entitled to the use and benefit thereof until the lands are finally sold, and that in the meantime to the Indians use and benefit the Interior Department has authority to issue exclusive grazing permits as aforesaid for a consideration.

The defendant maintains that such permits would impede settlement [19] and sale of the lands and are contrary to the intent of Congress.

The Court is of the opinion that the Interior Department has not the power claimed. The Indians' "right, title and interest" in the lands involved were at the time of the aforesaid agreement, of occupancy and use only, the fee being in the United States. They relinquished all thereof to the United States

and the latter accepted the same. The purpose was to effectuate the policy of breaking up tribal relations, of settling the Indians upon separate tracts of individual ownership in fee, and of disposing of surplus lands to others for a consideration for the benefit of the Indians and ultimately to the benefit of the community and nation.

By this the Indian title to the lands was extinguished and thereafter they were no longer Indian country. The lands were to be disposed of under the general public land laws in the main, and not to revert to the Indians under any circumstances. Thereupon the lands were or became wholly territory and property of the United States, full dominion over which is by the Constitution vested in Congress, to be disposed of as the latter willed. By the Act aforesaid, Congress incorporated the lands in the general mass of public lands, subject to all the incidents of the latter, and to be likewise disposed of as aforesaid. In so far as said Act creates a trust, it would seem that it is merely precautionary, not intended to enlarge the Indians' right, title or interest in the lands nor to create a reversion therein, but attaching to only the proceeds of sales of the lands.

The President and the Interior Department are the instruments to execute the will of Congress in the disposition of public lands. They have no authority and power therein save that derived from some act of Congress.

The Act here involved confers upon them authority and power to sell the lands, but neither expressly nor by implication does it empower them to prescribe

grazing regulations in respect to said lands and to issue exclusive licenses thereon for a consideration or at all. Even if a trust attaches to the lands, a trust to sell gives no power to lease. It can be nothing but a qualified trust, the lands approximating public lands in general and with all the incidents of the latter, including the hereinafter mentioned implied license of common grazing. And any trust herein is to the Government as trustee, not to the Interior Department. The policy of the Government from its foundation has been to permit free and unrestrained grazing of the public lands. It impliedly [20] licenses all comers to enjoy this privilege. The benefits of this policy are many and compensatory. It promotes settlement and disposition of the public lands. It aids the settler, to whom the Government's policy has always been liberal, to establish himself. It increases and cheapens the country's supply of meats. See Buford vs. Houtz, 133 U. S. 326. The Act involved indicates no purpose to reverse this policy or to revoke this license, and it will not be implied. In fact, Congress has steadily refused to authorize leases of the public lands, though on occasion, by express enactment, has authorized the Interior Department to lease certain Indian lands. Furthermore, the aforesaid regulations and licenses of the Interior Department tend to impede settlement and sale of the lands and thus to defeat the intent of Congress.

True, the lands subject to the license are still open to settlement and sale, but the average settler would hesitate to invade the domain or enclosure of a cor-

poration or other licensee. He would fear, with or without reason. And settling therein he would place himself where all grazing privileges were denied him. Other reasons are obvious. It is believed that the Interior Department in the matter of the aforesaid grazing permits is without the sanction of Congress.

Upon the whole, the Court is persuaded that the defendant is not a trespasser upon the lands involved and that it can lawfully enter upon and graze thereon. It follows that the order to show cause should be and is vacated.

August 19, 1913.

GEO. M. BOURQUIN,
Judge.

Filed Aug. 19, 1913. Geo. W. Sproule, Clerk.
[21]

Thereafter, on December 16th, 1913, order for decree was filed and entered herein, being in the words and figures following, to wit:

United States District Court, Montana.

UNITED STATES,

vs.

ASH SHEEP CO.

Order Directing Entry of Decree.

Herein, for reasons set out in its order denying a preliminary injunction, the Court holds complainant has no cause of action and a decree will be entered for defendant, dismissing the suit.

Dec. 16th, 1913.

BOURQUIN, J.

Filed and entered Dec. 16th, 1913. Geo. W. Sproule, Clerk. [22]

Thereafter, on December 26, 1913, a Decree was duly filed and entered herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Decree.

This cause came on for final hearing before the Court on the 17th day of December, 1913, upon the bill of complaint and the answer, and was argued by counsel, and thereupon, upon consideration thereof, in accordance with the reasons set out by the court in its decision filed herein on August 19, 1913, vacating the order to show cause and discharging the temporary restraining order previously issued, wherein it was held by the Court that the Indian title to the lands involved in this controversy, to wit:

"Section twenty-seven (27), township two (2) north, range thirty-six (36) east; section twelve (12), township one (1) north, range thirty-six (36) east; sections six (6) and seven (7), township four (4) north, range thirty-six (36) east of Montana Principal Meridian."

has been extinguished, and that Congress has incorporated the said land in the general mass of public lands, to be opened to settlement and sale, and that exclusive permits to graze said land are void, and without legal authority and legal sanction, it is

ORDERED, ADJUDGED and DECREED as follows, viz.:

That complainant's bill of complaint herein be, and the same hereby is, dismissed.

Dated December 26, 1913.

GEO. M. BOURQUIN,
Judge.

[Indorsed]: Title of Court and Cause. Decree. Filed and Entered December 26, 1913. Geo. W. Sproule, Clerk. [23]

Whereupon, said pleadings, process and final decree are entered of final record herein in accordance with the law and the practice of this court.

Witness my hand and the seal of said court at Helena, Montana, this 26th, day of December, A. D. 1913.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk. [24]

Thereafter, on June 30th, 1915, the Mandate of the Circuit Court of Appeals was duly filed and entered herein, in the words and figures following, to wit:

Mandate.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the District of Montana, GREETING:

Whereas, lately in the District Court of the United States for the District of Montana, before you, or some of you, in a cause between United States of America, Complainant, and Ash Sheep Company, a Corporation, Defendant, No. 11, a Decree was duly filed and entered on the 26th day of December, A. D. 1913, dismissing the complainant's Bill of Complaint; which said Decree is of record in the said cause in the office of the clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by United States of America, as appellant, against Ash Sheep Company, a corporation, as appellee, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 22d day of October in the year of our Lord one thousand nine hundred and

fourteen, the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with directions **[25]** to enter judgment for the complainant for the injunction prayed for and for such damages as the Court may find the complainant entitled to.

(March 8, 1915.)

YOU, THEREFORE, ARE HEREBY COMMANDED, That such execution and further proceedings had in the said cause in accordance with the Opinion and Decree of this court and as according to right and justice and the laws of the United States ought to be had, the said Decree of the said District Court notwithstanding.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 24th day of May, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America the one hundred and thirty-ninth.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

(Filed and entered June 30, 1915. Geo. W. Sproule, Clerk.)

Thereafter, on Jan. 26, 1916, motion for judgment was duly filed herein, in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs. **[26]**

ASH SHEEP COMPANY, a Corporation,

Defendant.

Motion for Judgment and Decree.

Now comes the complainant, United States of America, and respectfully shows to this Honorable Court;

That the above-entitled cause was duly commenced in this court, and that thereupon a temporary restraining order was issued together with an order to show cause why a preliminary injunction should not be issued, and that upon the hearing of said order to show cause a decree was entered discharging the temporary restraining order, vacating the order to show cause and dismissing the complainant's bill of complaint;

That thereupon the complainant appealed said cause to the United States Circuit Court of Appeals for the Ninth Circuit, where the decree of this court was reversed and said cause was remanded to this court with directions "to enter judgment for the complainant for the injunction prayed for and for

such damages as the court may find the complainant entitled to."

That on the 24th day of May, 1915, mandate issued from said United States Circuit Court of Appeals for the Ninth Circuit, and by order of this court, on motion, said mandate was filed and entered of record in this cause on the 30th day of June, 1915.

The complainant therefore, now moves the Court for final decree and judgment in said cause upon the allegations set forth and contained in the complainant's bill of complaint, the admissions set forth and contained in the defendant's answer and the law as laid down in said mandate and opinion, granting to the complainant the injunction prayed for in said bill of complaint together with damages in the sum of $7,100.

B. K. WHEELER,
United States Attorney. [27]
HOMER G. MURPHY,
FRANK WOODY,
Assistant United States Attorneys.

Service of the foregoing motion accepted and copy thereof received this 24th day of January, 1916.

C. B. NOLAN and
WM. SCALLON,
Attorneys for Defendant.

(Filed Jan. 26th, 1916. Geo. W. Sproule, Clerk.)

Thereafter, on Feb. 10, 1916, a decree was duly filed and entered herein, in the words and figures following, to wit:

District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Decree of February 10, 1916.

This cause came on regularly to be heard on the 31st day of January, 1916, upon the motion of the complainant for judgment on the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, and upon the pleadings on file in said cause, and was by counsel for complainant and defendant submitted to the Court and by the Court taken under advisement;

And it appearing to the Court, and the Court finds, as appears by its decision and memo filed herein and being hereof made a part, that the complainant is entitled to a perpetual injunction [28] against the defendant, as prayed for in the bill of complaint, together with a judgment for the sum of one dollar nominal damages and costs of suit; and upon consideration thereof, and the Court being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the said defendant, and its officers, agents, ser-

vants, attorneys and employes be, and they are hereby perpetually enjoined and restrained from grazing the sheep of said defendant upon the lands, of any thereof, particularly mentioned and described in the plaintiff's bill of complaint;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said complainant have and recover of and from the defendant the sum of one dollar damages and its costs and disbursements incurred in said action taxed in the sum of ——— Dollars.

Done in open court this 10th day of February, 1916.

GEO. M. BOURQUIN,
Judge.

(Filed and Entered Feb. 10, 1916. Geo. W. Sproule, Clerk.)

WHEREUPON, said Mandate, Motion for Judgment and Decree are entered of final record herein, in accordance with the law and practice of this court.

Witness my hand and the seal of said Court at Helena, Montana, this 10th day of February, A. D. 1916.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk. [29]

That on the 4th day of February, 1916, Memo Opinion of the Court was duly filed herein on the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

No. 11.

UNITED STATES OF AMERICA,

vs.

ASH SHEEP COMPANY.

Decision of February 4, 1916.

This is a suit to enjoin defendant from grazing sheep on lands now determined to be Indian lands held in trust by plaintiff (221 Fed. 587), and for damages.

Plaintiff contends that it is entitled to recover one dollar per head of sheep grazed, by virtue of Sec. 2117 R. S., which provides that any one who drives any "stock of horses, mules or cattle, to range and feed on any land belonging to an Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock." This is impossible for several reasons:

First, the statute contemplates lands so far in Indian occupancy and control that grazing will be an injury to the Indians and to which they may consent. The lands involved are otherwise.

Second, the penalty expressly attaches to "horses, mules or cattle" and sheep are not thereby included. It is apparent that Congress had in mind the particular and limited definition of the word "cattle"—

animals of the bovine genus—and not the general and extended meaning—all animals of domestic kind. Otherwise, horses and mules would not have been specially mentioned, or would have been so mentioned as to indicate but enumeration of particulars of a general class following. To illustrate, "horses, mules or any other cattle." For **[30]** horses and mules are within the general meaning of "cattle," even as sheep, swine, etc. are. Examination of the Acts of Congress, and especially Indian legislation, makes manifest that Congress practically invariably uses the word "cattle" in the limited sense of bovine animals, and for general inclusion makes use of the words "stock," "useful domestic animals," and "livestock." In the earliest legislation to penalize grazing Indian lands, the prohibition was of "horses or cattle," and the same act provided that the Indians would be supplied with "useful domestic animals." 1 Stat. 747. Range animals were intended, and sheep were not then ranged. U. S. vs. Mattock, Fed. Cas. 15,744 is to the contrary, but seems to lay too much stress upon the mischief intended to be remedied. A case is not within a penal statute though within the mischief of, unless also within the legislative intent as disclosed by the language used. It would seem Congress had in mind only the three classes of range animals, horses, mules and bovines, and fixed a proportionate penalty for punishment and not for confiscation as it often would be if applied to sheep or swine.

Third, if the complaint is sufficient for penalties, equity never aids the collection of statutory penal-

ties. True, equity having jurisdiction retains it for full relief. But this for remedial and not punitory purposes. Here, for injunction and compensatory damages, and not for punishment of which are penalties.

Fourth, the appellate tribunal remanded the suit "with directions to enter judgment for the complainant for the injunction prayed for and for such damages as the Court may find complainant entitled to."

That is the law of the case.

There is no evidence of substantial damages, and for the technical trespass nominal damages are awarded.

Decree will be entered for an injunction, one dollar damages and costs.

BOURQUIN, J.

Filed Feb. 4, 1916. Geo. W. Sproule, Clerk. **[31]**

Thereafter, on August 2, 1916, defendant filed its Assignment of Errors herein as follows, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled cause, and files the following Assignment of Errors

upon which it will rely upon its prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 10th day of February, 1916.

I.

The District Court of the United States, in and for the District of Montana erred in ordering a decree herein in favor of the complaint and against the defendant.

II.

Said Court erred in rendering and entering a decree herein in favor of the complainant and against the defendant.

III.

Said Court erred in holding and finding and decreeing that the complainant was entitled to damages.

IV.

The Court erred in not finding in favor of the defendant.

V.

The Court erred in finding for the complainant.

VI.

The Court erred in finding that the defendant was not entitled to run or graze its sheep on the premises described in the complaint.

VII.

The Court erred in not finding that the defendant was [32] entitled to run and graze its sheep on the lands described in the complaint.

VIII.

The Court erred in awarding an injunction to the complainant.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant.

Due personal service of foregoing Assignment of Errors made and admitted and receipt of copy acknowledged this 2d day of August, 1916.

B. K. WHEELER,
Solicitor for Complainant.

(Filed Aug. 2d, 1916. Geo. W. Sproule, Clerk.)
[33]

Thereafter, on August 2, 1916, Petition for Allowance of Appeal was filed herein as follows, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant,
vs.
ASH SHEEP COMPANY, a Corporation,
Defendant.

Petition for Appeal and Allowance.

The above-named defendant, Ash Sheep Company, a corporation, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 10th day of February, 1916, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the Assign-

ment of Errors filed herewith, and it prays that its appeal be allowed, and that a citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided.

And your petitioner further prays that a proper order relating to the security to be required of it be made.

ASH SHEEP COMPANY.
By C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant.

Due personal service of foregoing Petition for appeal made and admitted and receipt of copy acknowledged this 2d day of August, 1916.

B. K. WHEELER,
Solicitor for Complainant.

(Filed Aug. 2d, 1916. Geo. W. Sproule, Clerk.)

[34]

Thereafter, on August 9, 1916, an Order Allowing Appeal was duly filed herein as follows, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant,
vs.
ASH SHEEP COMPANY, a Corporation,
Defendant.

Order for Allowance of Appeal.

On reading and considering the petition of the defendant in the above-entitled cause for the allowance of an appeal herein and its assignment of errors filed in the office of the clerk of the District Court of the United States, in and for the District of Montana, on the 2d day of August, 1916;

IT IS HEREBY ORDERED that the appeal of the defendant from the judgment and decree rendered and entered in said cause on the 10th day of February, 1916, is hereby allowed; the defendant-appellant to give bond, as required by law, in the sum of three hundred dollars ,($300.00).

WM. W. MORROW,
United States Circuit Judge and Judge of the U. S. Circuit Court of Appeals for the Ninth Circuit.

(Filed Aug. 9th, 1916. Geo. W. Sproule, Clerk.)
[35]

Thereafter, on August 9, 1916, Bond on Appeal was duly filed herein as follows, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant,
vs.
ASH SHEEP COMPANY, a Corporation,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, the Ash Sheep Company, a corporation, as

principal, and American Surety Company of New York, as surety, are held and firmly bound unto the above-named United States of America in the sum of Three Hundred Dollars ($300) lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves jointly and severally and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated this 2d day of August, 1916.

WHEREAS, the above-named defendant, Ash Sheep Company, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse a decree rendered and entered in the above-entitled cause in the United States District Court for the District of Montana on the 10th day of February, 1916;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Ash Sheep Company, a corporation, shall prosecute its said appeal to effect and answer all costs, if it fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect. **[36]**

It is expressly agreed by American Surety Company of New York, the surety above named, that in case of a breach of any condition of this bond, the Court may, upon notice of not less than ten days to said American Surety Company of New York proceed summarily in this action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment against the said Amer-

ican Surety Company of New York, and award execution therefor.

ASH SHEEP COMPANY.
By C. B. NOLAN,
WM. SCALLON,
Its Solicitors.

AMERICAN SURETY COMPANY OF NEW YORK.
TED E. COLLINS,
Resident Vice-President,

[Seal] Attest: HOMER G. MURPHY,
Resident Assistant Secretary.

The foregoing Bond on Appeal is hereby approved this 5th day of August, 1916.

WM. W. MORROW,
United States Circuit Judge and Judge of the Circuit Court of Appeals for the Ninth Circuit.

(Filed Aug. 9th, 1916. Geo. W. Sproule, Clerk.)
[37]

Thereafter, on August 9, 1916, a Citation duly issued on August 5, 1916, was filed herein, which original Citation is hereto annexed and is in the words and figures following, to wit: [38]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant.

Citation on Appeal.

United States of America,—ss.

To United States of America, and to B. K. Wheeler, Esq., United States District Attorney for the District of Montana:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the clerk of the District Court of the United States in and for the District of Montana, wherein United States of America is complainant and appellee, and Ash Sheep Company, a corporation, is defendant and appellant, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM W. MORROW, Judge of the United States Circuit Court of Appeals for the Ninth Circuit this 5th day of August, 1916.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Due personal service of the within Citation on Appeal made and admitted and receipt of copy acknowledged this 9th day of August, 1916.

BURTON K. WHEELER,
Solicitor for Complainant,
U. S. Attorney. [39]

[Endorsed]: No. 11. In the District Court of the United States, in and for the District of Montana. United States of America, Complainant, vs. Ash Sheep Company, a Corporation, Defendant. Citation on Appeal. Filed Aug. 9th, 1916. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [40]

Thereafter, on August 26, 1916, Praecipe for Transcript on Appeal was duly filed herein as follows, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Praecipe for Transcript of Record.

To Burton K. Wheeler, Esq., United States Attorney for Montana, Attorney for the Plaintiff, and to George W. Sproule, Esq., Clerk of said Court:

You will please incorporate the following papers in the transcript on appeal:

1. The final record in said cause filed herein on February 10, 1916;

2. The memorandum decision of the Court and complete decision the Court rendered and filed therein on the 19th day of August, 1913;

3. Order of court made and entered in said cause on the 16th day of December, 1913, ordering a decree

in favor of said defendant and dismissing complainant's bill of complaint;

4. Memorandum decision of the Court filed February 4, 1916;

5. The appeal papers herein, consisting of the petition and allowance, assignment of errors, bond and citation on appeal.

This praecipe for the papers and files to be included in said transcript on appeal.

Dated this 9th day of August, 1916.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant.

Due personal service of the foregoing praecipe and a copy thereof this 12th day of August, 1916, is hereby admitted and acknowledged.

BURTON K. WHEELER,
Solicitors for Plaintiff.
U. S. Attorney.

(Filed Aug. 26, 1916. Geo. W. Sproule, Clerk.)

[41]

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 42 pages, numbered consecutively from 1 to 42 inclu-

sive, is a true and correct transcript of the pleadings, process, orders, decrees, decisions, and all other proceedings in said cause required to be incorporated in the record on appeal, therein by the praecipe of the appellant for said record on appeal, including said praecipe, and of the whole thereof, as appears from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Eighteen and 50/100 Dollars, and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 29th day of August, A. D. 1916.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled 8/29/16. C. R. G. **[42]**

[Endorsed]: No. 2855. United States Circuit Court of Appeals for the Ninth Circuit. Ash Sheep Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed September 1, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed Sept. 23, 1916. F. D. Monckton, Clerk.

No. 2855

United States
Circuit Court of Appeals
For the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court for the District of Montana.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1917, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Wednesday, the twentieth day of February, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2855.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

No. 3059.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant in Error.

Order of Submission.

ORDERED above-entitled causes argued by Mr. C. B. Nolan, counsel for the Ash Sheep Company, a corporation, and by Mr. B. K. Wheeler, United States Attorney, counsel for the United States of

America, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1917, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the sixth day of May, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, Erskine M. Ross and William H. Hunt, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: Ash Sheep Company, a Corporation, Appellant, vs. United States of America, Appellee. No. 2855. * * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2855.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Opinion U. S. Circuit Court of Appeals.

C. B. NOLAN and WM. SCALLON, for the Appellant.

BURTON K. WHEELER, United States Attorney, HOMER G. MURPHY, Assistant United States Attorney, and JAMES H. BALDWIN, Assistant United States Attorney, for the Appellee.

Before GILBERT, ROSS and HUNT, Circuit Judges.

GILBERT, Circuit Judge:

On the former appeal of this case this court held by a majority opinion that the lands of the Crow Indians surrendered to the United States under the Act of April 27, 1904 (33 Stat. 352), were held by the United States in trust, and did not become public lands, and that the United States was entitled to an injunction against the Ash Sheep Company, enjoining it from pasturing sheep upon said lands. United States v. Ash Sheep Co., 221 Fed. 582. The judgment of the court below was therefore reversed,

and the cause was remanded with instructions to issue an injunction as prayed for, and to render judgment for such damages as the Court might find the complainant to be entitled to. On the trial thereafter had, the court below awarded nominal damages against the defendant in the sum of $1.00, finding from the evidence that no damage had been done to the lands by the defendant, and denied the right of the United States in that suit to recover under the provisions of section 2117, Rev. Stats., the penalty of $1.00 per head for the 7,100 head of sheep that had grazed upon the lands, holding that sheep were not included in the enumeration of animals found in Section 2117, and holding also that even if penalties were recoverable, they could not be recovered in that suit since equity would not aid the collection of statutory penalties. A decree was accordingly entered perpetually enjoining the defendant from grazing its sheep upon the lands mentioned in the bill, and adjudging that the United States recover of and from the defendant the sum of $1.00 damages, and its costs and disbursements. From that decree the defendant brings this appeal.

It is admitted that the appeal in this case is taken principally for the purpose of keeping alive the right of the appellant to present by appeal to the Supreme Court of the United States the question whether the lands so surrendered by the Crow Indians to the United States are public lands or are lands held in trust by the United States for the Indians, and subject to the control of the Bureau of Indian Affairs. No additional ground now is suggested for holding other-

wise than as we held before, and our prior judgment must be accepted as the law of the case on this appeal. Roberts v. Cooper, 20 How. 467, 481; Oregon R. R. & Nav. Co. v. Balfour, 90 Fed. 295; Standard Sewing Mach. Co. v. Leslie, 118 Fed. 557.

The decree is affirmed.

[Endorsed]: Opinion. Filed May 6, 1918. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2855.

ASH SHEEP COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Montana.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Decree. Filed and entered May 6, 1918. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Appeal to Supreme Court U. S.

To the Honorable, the Justices of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the Ash Sheep Company, a corporation, the appellant in the above-entitled cause, by C. B. Nolan, Esq., and William Scallon, Esq., its solicitors, and feeling aggrieved by the final decree of this Court entered on the 6th day of May, 1918, affirming the decision of the District Court of the United States in and for the District of Montana, hereby prays that an appeal be allowed to it from the said decree to the Supreme Court of the United States, and in connection with this petition, petitioner herewith files its Assignment of Errors and affidavit showing that the matter herein in controversy exceeds one thousand dollars ($1,000.00), besides interest and costs.

Petitioner further prays that an order of supersedeas may be entered herein pending the final dis-

position of the cause, and that the amount of security may be fixed by the order allowing this appeal.

C. B. NOLAN,
WILLIAM SCALLON,
Solicitors for Petitioner-Appellant.

[Endorsed]: Petition for Appeal to Supreme Court U. S. Filed Aug. 3, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Assignment of Errors on Appeal to Supreme Court U. S.

Now comes the appellant, the Ash Sheep Company, a corporation, by its undersigned solicitors, and in connection with its petition for appeal from the decree of the above-entitled court made and entered on May 6th, 1918, says that in the record, the proceedings and the final decree aforesaid, manifest error has intervened to the prejudice of the appellant, to wit:

I.

The Circuit Court of Appeals of the United States for the Ninth Circuit erred in not holding that the bill of complaint does not state facts sufficient to constitute a cause of action.

II.

Said Court erred in not holding that the answer of this defendant states facts sufficient to constitute a defense to the action.

III.

Said Court erred in holding that the lands in question herein and over which the trespasses and the grazing of sheep are alleged to have been committed and done were not public lands of the United States, nor lands over which the defendant had a right to run, or graze, or pasture its sheep.

IV.

Said Court erred in holding that the said lands were Indian lands at the times in question in this cause.

V.

Said Court erred in holding that the said lands were subject to the control and the rules and regulations of the Indian Department of the United States.

VI.

Said Court erred in holding that the defendant had no right to pasture or to move its sheep over said lands.

VII.

Said Court erred in holding that an injunction should issue against the defendant to prevent the pasturing of its sheep on said lands.

VIII.

Said Court erred in not reversing the decree of the United States District Court in and for the District of Montana.

IX.

Said Court erred in following the opinion rendered

upon the former appeal of this cause in the said Circuit Court of Appeals of the United States for the Ninth Circuit, and in not reversing the same.

X.

Said Court had erred in the former appeal in reversing the decision of the District Court of the United States in and for the District of Montana, and in directing the issuance of an injunction and a judgment for damages against the defendant.

XI.

Said Court had erred in the former appeal in holding that the lands in question were not public lands and that the defendant-appellant had no right to pasture its sheep thereon.

XII.

Said Court had erred in the former appeal in holding that the said lands were still within the jurisdiction and under the control of the Indian Department of the United States.

XIII.

Said Court had erred on the former appeal in holding that said lands were still Indian lands.

XIV.

Said Court had erred on the former appeal in holding that the said lands were Indian lands at the times in question in this cause.

XV.

Said Court erred in deciding for the plaintiff-appellee and against the defendant-appellant.

WHEREFORE, appellant prays that the said decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed, with directions

that the cause be remanded to the United States District Court in and for the District of Montana with directions to that Court to dismiss the suit.

C. B. NOLAN,
WILLIAM SCALLON,
Solicitors for Appellant.

[Endorsed]: Assignment of Errors on Appeal to Supreme Court U. S. Filed Aug. 3, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Affidavit of Chris Yegen on Appeal to Supreme Court U. S.

State of Montana,
County of Yellowstone,—ss.

Chris Yegen, being first duly sworn, says: That he is the vice-president of the Ash Sheep Company, the appellant in the above-entitled cause, and that he has been vice-president of said company for more than 12 years last past; that he knows the lands in question in this cause, to wit, the lands over which it is alleged in the bill of complaint that the defendant grazed its sheep in the year 1913, knows the character of said lands, and knows the value of the right of pasturage of sheep over said lands and the

market value of such pasturage; that the market value of the right to pasture the appellant's sheep on the said lands exceeded and exceeds the sum of one thousand dollars, and that, specifically, the right to pasturage for the number of sheep owned by the defendant exceeds the sum of one thousand dollars, and that such right exceeded such sum during the times in question in this cause.

Affiant further states that the damages that will accrue to the defendant-appellant by the issuance of the injunction granted in this cause exceeds the sum of one thousand dollars ($1,000.00), exclusive of costs, and that the damages already accrued and caused to said appellant exceed the sum of one thousand dollars ($1,000.00) besides costs;

That the matter in controversy herein exceeds one thousand dollars ($1,000.00) besides costs.

CHRIS YEGEN.

Subscribed and sworn to before me this 26th day of July, 1918.

[Seal] BLANCHE SPANGLER,
Notary Public for the State of Montana; Residing at Billings, Montana.

My commission expires Dec. 18, 1920.

[Endorsed]: Affidavit of Chris Yegen. Filed Aug. 3, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Stipulation Respecting Bond on Appeal to Supreme Court U. S.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled cause, acting through their respective counsel of record, that the bond herein on appeal be conditioned in the sum of Five Hundred Dollars for payment of damages and costs upon an affirmance or dismissal of such appeal and upon the giving of such a bond, no execution shall issue until after the determination of the matter in the United States Supreme Court.

Dated this 29th day of July, 1918.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Appellant,
B. K. WHEELER,
United States District Attorney for the District of Montana,
HOMER G. MURPHY,
Assistant United States District Attorney for the District of Montana,
Solicitors for Appellee.

[Endorsed]: Stipulation Respecting Bond on Appeal to Supreme Court U. S. Filed Aug. 3, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Bond on Appeal to Supreme Court U. S.

KNOW ALL MEN BY THESE PRESENTS: That we, Ash Sheep Company, a corporation, as principal, and Massachusetts Bonding and Insurance Company, as surety, are held and firmly bound unto the United States of America in the sum of Five Hundred Dollars ($500.00), lawful money of the United States, to be paid to it, to which payment well and truly to be made, we bind ourselves, each of us, jointly and severally, by these presents;

Sealed with our seals and dated this 24th day of July, 1918.

Whereas, the above-named appellant, Ash Sheep Company, a corporation, has taken an appeal to the Supreme Court of the United States to reverse the decree of the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled case, or is about to take such an appeal.

Now, therefore, the condition of this obligation is

such that if the above-named appellant shall prosecute its said appeal to effect, and answer all costs if it fails to make its appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

ASH SHEEP CO., a Corporation,
By C. YEGEN,
Vice-president.

[Seal] Attest: W. B. W. JOHN,
Secretary.

MASSACHUSETTS BONDING & INSURANCE CO.
By SOL. P. ZUANSKI,
Agent.

[Seal] Attest: C. B. NOLAN,
Attorney in Fact.

The foregoing bond and surety approved this 3rd day of August, 1918.

WM. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: Bond on Appeal to Supreme Court U. S. Filed Aug. 3, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Order Allowing Appeal to Supreme Court of the United States and Fixing Amount of Bond.

On motion of C. B. Nolan, Esq., and William Scallon, Esq., solicitors for appellants, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed, and entered herein, be, and the same is hereby, allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered, that the bond on appeal be fixed at the sum of five hundred dollars.

Dated, August 3d, 1918.

WM. H. HUNT,
United States Circuit Judge.

[Endorsed]: Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond. Filed Aug. 5, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2855.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-one (61) pages, numbered from and including 1 to and including 61, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 17th day of August, A. D. 1918.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Citation on Appeal to Supreme Court U. S.

United States of America,—ss.

To United States of America, Appellee, and to B. K. Wheeler, United States District Attorney, its Attorney, GREETING:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to an order allowing an appeal filed and entered in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit from a final decree filed and entered on the 6th day of May, 1918, in said court, in that certain suit being in Equity No. 2855, wherein the Ash Sheep Company, a corporation, is plaintiff and appellant and you are defendant and appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said order allowing appeal mentioned should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. HUNT, United States Circuit Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this

3d day of August, 1918, and of the Independence of the United States the one hundred and forty-third.

WM. H. HUNT,

Circuit Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Citation on Appeal to Supreme Court U. S. Filed Aug. 13, 1918. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk

Due personal service of within Citation on Appeal made and admitted and receipt of copy acknowledged this 9th day of August, 1918.

B. K. WHEELER,
U. S. Attorney.
HOMER G. MURPHY,
Asst. U. S. District Attorney,
Solicitor for Appellee.